IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2004

THOMAS R. WARREN, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. 4056 Jane Wheatcraft, Judge

No. M2002-02907-CCA-R3-CO - Filed September 21, 2004

The petitioner, Thomas R. Warren, Jr., appeals the Sumner County Criminal Court's dismissal of his petition for post-conviction relief. He claims that the trial court erred by denying his petition to test evidence pursuant to T.C.A. § 40-30-303 (2003), the Post-Conviction DNA Analysis Act of 2001. We affirm the trial court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., and JOE G. RILEY, SP. J., joined.

Thomas R. Warren, Jr., Nashville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; and Lawrence Ray Whitley, District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the petitioner's conviction for rape. At the trial, the victim testified that on October 24, 1974, the petitioner abducted her, drove to another house, and raped her. This court affirmed the petitioner's conviction and resulting ninety-nine-year sentence. See Thomas Warren, Jr. v. State, No. 4056, Sumner County (Tenn. Crim. App. Dec. 17, 1976), cert. denied (Tenn. Dec. 17, 1976). In 1993, the petitioner filed a petition for post-conviction relief. The trial court dismissed the petition, and this court affirmed the trial court's ruling. See Thomas Warren, Jr. v. State, No. 01C01-9110-CR-00292, Sumner County (Tenn. Crim. App. July 22, 1993), app. denied (Tenn. Nov. 29, 1993). On January 16, 2002, the petitioner filed a second petition for post-conviction relief, requesting DNA testing on evidence from his trial. The petitioner claimed that according to trial testimony, investigators sent physical evidence from his case to the Tennessee and Federal Bureaus of Investigation and that "sophisticated DNA testing procedures can identify any forensic evidence revealed from . . . recovered clothing and samples that were presented at trial."

In response to the petition, the trial court requested that all of the exhibits from the petitioner's trial be returned to the trial court for review. The state claimed that the evidence requested by the petitioner was unavailable and submitted affidavits from Hendersonville Police Chief David L. Key, District Attorney General Lawrence Ray Whitley of the Eighteenth Judicial District, and Criminal Court Clerk Mahailiah Hughes of the Eighteenth Judicial District. Chief Key, Mr. Whitley, and Ms. Hughes each stated that they had searched their offices and had been unable to find any physical evidence relating to the petitioner's case. The trial court concluded that the petitioner's request for DNA analysis should be denied because the evidence in the case no longer exists.

The petitioner claims the trial court erred by denying his petition. He notes that a Federal Bureau of Investigation (FBI) agent testified at his trial that a hair found in his car was "of a similar nature as hair found on the victim's head" and contends that the state failed to show the FBI no longer possesses the hair. In addition, he claims that he is entitled to any test results the FBI conducted on the hair or other physical evidence in the case. The state claims the trial court properly denied the petition. We agree with the state.

The Post-Conviction DNA Analysis Act of 2001 provides that a person convicted of rape:

> [M]ay at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

T.C.A. § 40-30-303 (2003). DNA analysis is required if the trial court determines that

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

T.C.A. § 40-30-304 (2003); see also T.C.A. § 40-30-305 (2003).

Initially, we note that the petitioner has not made the trial transcript containing testimony about scientific tests conducted on the physical evidence part of the post-conviction record. However, we take judicial notice of the record in the appeal of the petitioner's conviction. See State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 505, 376 S.W.2d 451, 453 (1964). Our review of the trial transcript reveals that a Hendersonville Police Department detective vacuumed the car driven by the petitioner. Sergeant David Key, who is now the Chief of the Hendersonville Police Department, testified that he sent the evidence collected in the case, including the vacuum cleaner bag, to the FBI for testing and that the FBI returned all of the evidence to the police department. An FBI agent testified that he found hairs in the bag, mounted some of the hairs on glass microscope slides, compared one of the hairs to a hair collected from the victim, and determined that the two hairs were similar. The trial transcript shows that various microscope slides prepared by the FBI were present in the courtroom, although not all of them were introduced into evidence.

The Post-Conviction DNA Analysis Act states that one of the prerequisites to a trial court's ordering DNA analysis is that the evidence requested for testing still exist. If this prerequisite cannot be established, then the trial court can dismiss the petition. See William D. Buford v. State, No. M2002-02180-CCA-R3-PC, Williamson County, slip op. at 6 (Tenn. Crim. App. Apr. 24, 2003), app. denied (Tenn. Sept. 2, 2003) (stating that the "failure to meet any of the qualifying criteria is, of course, fatal to the action"). We conclude that the trial court properly dismissed the petition in the present case on the basis that the evidence is no longer in existence. The FBI agent microscopically compared a hair collected from the car with a hair collected from the victim but gave no testimony regarding chemical or electronic testing. We can infer from the agent's testimony that microscopic hair comparison in no way indicates forensic testing related to DNA analysis. Moreover, we note that DNA analysis was not available at the time of the petitioner's trial. See State v. Overbay, 806 S.W.2d 212 (Tenn. Crim. App. 1990). The transcript shows that the FBI returned the evidence to the Hendersonville Police Department and that the evidence was present at trial. However, the Hendersonville Police Chief, the District Attorney General for the Eighteenth Judicial District, and the criminal court clerk submitted affidavits stating that they had searched and been unable to find any physical evidence associated with this case. We conclude that the record supports the trial court's determination that no evidence from the petitioner's trial still existed.

Based upon the foregoing and the record as a whole, we affirm the trial court's dismissal of the petition.

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JOSEPH M. TIPTON, JUDGE